83-1612

FILED
MAR 30 1984
ALEXANDER L. STEVAS
CLERK

No.

IN THE SUPREME COURT
OF
THE UNITED STATES

October Term, 1983

PAUL W. GIBSON,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Albert F. Cullen, Jr.
CULLEN & WALL
141 Tremont Street
Boston, Massachusetts 02111
Telephone: (617) 482-8650
Attorney for Petitioner
Paul W. Gibson

QUESTIONS PRESENTED

I. Whether the trial judge impermissibly invited the jury to shift the burden of proof by instructing the jury that if you think there is a real possibility that the defendant is not guilty he gets the benefit of the doubt.

II. Whether the trial court by its instructions permitted the jury to find petitioner guilty if the jury found that Plaintiff had threatened picketing or other non-violent activities of organized labor, thereby impermissably amending the indictment, which specified the means of harm threatened to be "violence to the business of [Advanced Industrial Systems] and...physical harm and violence to said officer and his family."

TABLE OF CONTENTS

	Page
Questions Presented	1
Table of Authorities	iii
Opinion Below	v
Jurisdiction	v
Statutes	vi
Statement of the Case	1
Reasons for Granting the Petition	8
Conclusion	28
Appendix A, Opinion Below	App.1
Appendix B, Judgment Below	App.31

TABLE OF AUTHORITIES

Cases	Page
Cupp v. Naughton, 414 U.S. 141, 94 S.Ct. 396 (1973)	15
Ex. Parte Bain, 121, U.S. 1. (7 S.Ct. 718)	23
Ford v. United States, 273 U.S. 593, 47 S.Ct. 531, 71 L.Ed. 793 (1927)	24
Gaither v. United States 413 F.2d 1061 (D.C. Cir. 1969)	23
Goto v. Lane, 265 U.S. 393, 44 S.Ct. 525, 68 L.Ed. 1070 (1924)	25
Russell v. United States 369 U.S. 749, 82 S.Ct. 1038 (1962	23
Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270 (1960)	23,24, 27
Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930 (1978)	8,13
United States v.Cusmano, 659 F.2d 714 (6th Cir. 1981)	18,25
United States v. Fallen, 498 F.2d 172 (8th Cir. 1974)	10
United States v. Morris, 647 F.2d 568 (5th Cir. 1981	10

Cases	Page
United States v. Norris, 281 U.S. 619, 50 S.Ct. 424 (1930)	23
United States v. Stewart Chemical Laboratory, Inc. 652 F.2d 804 (9th Cir. 1981)	27
United States v. Stubin, 446 F.2d 457 (3rd Cir. 1971)	10
United States v. Winter, 663 F.2d 1120 (1st Cir. 1981)	23
Watson v. Jago, 558 F.2d 330 (6th Cir. 1976)	27
In Re Winship, 397 U.S. 358 90 S.Ct. 1068 (1969)	8,12

Statutes

18 United States Code Sec. 1951	vi,1

Miscellaneous

Pattern Criminal Jury Instruction § 21 Federal Judicial Center (1982)	10

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is incorporated into the petition as Appendix A . The District Court entered no opinion pertaining to the questions presented in this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1984. The text of the judgment is incorporated in this Petition as Appendix B . Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES

Title 18 United States Code § 1951

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section -

[(1) is omitted]

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

On October 21, 1982, the grand jury for the District of Massachusetts indicted Petitioner Paul W. Gibson under 18 U.S.C. 1951(a), charging him with attempted extortion of Advanced Industrial Systems, Inc. (hereinafter referred to as A.I.S.), a Massachusetts corporation, through threats to Thomas Guilderson, an officer of A.I.S. It was alleged that the attempt to obtain money was "induced by the wrongful use of fear of economic harm to A.I.S. and physical harm to the person of said officer [Guilderson] and his family in that the defendant threatened that violence would be done to the business of A.I.S. and that physical harm would be done to said officer [Guilderson] and his family unless

such payment was made."

Federal jurisdiction was based on the alleged violation of the above cited criminal statute.

After arraignment on November 1, 1983, Paul Gibson filed pre-trial motions including a motion for a bill of particulars requesting, inter alia, the means by which the alleged offense was committed. This portion of the motion was denied.

The jury trial began on January 18, 1983, and continued until January 21, 1983. At the close of the government's case, Paul Gibson moved for a judgment of acquittal. The motion was denied.

Petitioner testified in his defense that he had never threatened violence to the business of A.I.S. or physical harm to Thomas Guilderson and his family. Petitioner further

testified that when he spoke to Guilderson about "problems" that A.I.S. could have at a job site in Rhode Island, he was referring to informational picketing or other legitimate labor activity.

On January 20, 1983, both sides rested. The defendant renewed his motion for judgment of acquittal; the court again denied the motion. Petitioner submitted requests for jury instructions, including an instruction defining a reasonable doubt as "a doubt based upon reason and common sense."

The judge instructed the jury with respect to presumption of innocence and reasonable doubt as follows:

> A defendant in a criminal case is presumed by law to be innocent. That presumption remains with the defendant throughout the trial, unless he is proven guilty of the

crime charged by credible evidence beyond a reasonable doubt.

The burden of proving the defendant guilty beyond a reasonable doubt rests upon the government. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or for that matter to produce any evidence. The defendant may rely on evidence brought out on cross examination of witnesses for the government, and in this case he relies both on that and also on the evidence that he presented during the course of his defense.

If the government fails to prove the defendant guilty beyond a reasonable doubt, the jury must acquit him. Proof beyond a reasonable doubt is a phrase used in everyday conversation and it does not need extensive or elaborate definition. It is a reasonable doubt based upon reason and common sense and arising from the state of the evidence.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt.

There are very few things in this world that we know with absolute certainly and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly con-

vinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty. If two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, the jury should adopt the one of innocence.

After the instructions were given the defendant objected, inter alia, to that portion of the charge. "I object to your reasonable doubt charge... I think it shifts the burden"

The trial court also charged the jury as follows:

> The term "wrongful" is used in the statute and is required to be proved to limit the coverage of the Hobbs Act. Obtaining property by force or fear is wrongful only in those instances where the alleged extortionist has no lawful claim to the property sought.
>
> The Hobbs Act then does not, for example, condemn the use of coercive measures to obtain wage increases or to carry out a collective bargaining agreement, if there is an agreement between a union and

an employer. On the other hand, the Hobbs Act does forbid the use of coercive means to exact personal payoffs, and this aspect of the case is clear: that if the government proved that the defendant was exploiting fear or anxiety on the part of Guilderson about getting into trouble with the union down in Rhode Island and was taking money to pocket it periodically, well, then, if you reach that conclusion and if the other elements of the offense as I have been and will be further describing to you have been proved beyond a reasonable doubt, then you would be warranted to finding the defendant guilty.

It has not been suggested by anyone here in the case that a union official may exact payments to himself personally to guarantee labor peace. Unions have all sorts of legitimate rights under the law and, indeed, under the Constitution, but persons connected with the union may not bargain away those rights for personal gain. A union leader may not say: We won't picket if you pay me personally a sum of money. There may be a perfect right under the law for the union to picket, but that is the right that is preserved by the law, and there is no right, and, indeed, the Hobbs Act forbids, if other essential elements are proved, officials taking money for their own purposes, that is, lining their own pockets in order to pre-

> serve labor peace or to prevent lawful activity by the union, and that is part of the government's allegation, that is, that the defendant knew of the vulnerability to union activity of the Guilderson company down in Rhode Island and he exploited it, it is the government's allegation, by telling Guilderson that he could take care of it if he paid him some money.
>
> Well, if the intent on behalf of the defendant was to do that, was to get a personal payoff by means of exploiting Guilderson's fear of violence to the job in Rhode Island or personal harm to his family, and if you have the impact on interstate commerce and the other essential elements that I have and will be describing, then if the government proves that beyond a reasonable doubt it has proved its case.

Following the conviction of the Petitioner, the Court of Appeals for the First Circuit affirmed the judgment of the District Court.

REASONS FOR GRANTING THE PETITION

I. By Charging The Jury That If You Think There Is A Real Possibility That The Defendant Is Not Guilty He Gets The Benefit Of The Doubt The Trial Judge Invited The Jury To Shift The Burden Of Proof.

The fundamental elementary right of the defendant to put the government to its proof is an essential part of our criminal jurisprudence. In Re Winship, 397 U.S. 358, 359, 90 S.Ct. 1068, 1070 (1969); see, Taylor v. Kentucky, 436 U.S. 478, 483 98 S.Ct. 1930, 1933 (1978). In the present case the district court's instruction on reasonable doubt eroded the concept of reasonable doubt and shifted the burden of proof. The instruction treated the matter of proof as a fair fight between equal adversaries each being put to its proof - the government to "firmly convince" the

jury of the guilt of the defendant and on the other hand the defendant to create a "real possibility" that he is not guilty.

After the instructions on reasonable doubt were given the defendant objected, inter alia, to that portion of the charge. "I object to your reasonable doubt charge... I think it shifts the burden." The Court responded:

> The Court: I want to say something very briefly on that particular point. I did give what I have always given and then supplemented it with a paragraph, and I want, just for purposes of identification, to state that I took that from Pattern Criminal Jury Instruction which were just disseminated by the Federal Judicial Center in June of 1982. There is a committee to improve criminal jury instructions that within the week has issued them, and what I took was the precise language from Instruction No. 21, entitled, "Definition of Reasonable Doubt," and I am fully aware that it is an instruction which I have never given in the

past and which is perhaps vulnerable for the reason stated by Mr. Cullen. I don't think so, but he has a point. What I want the record to show is that the source of it was what I just stated in order that the definition may be considered, if this case should get to a higher court.

In the Commentary to the Definition of Reasonable Doubt to which the court made reference it is stated:

> The committee recognizes that many appellate opinions lend strong support to the standard formulation that a reasonable doubt is a doubt that would cause a person to hesitate to act in the most important of one's own affairs. E.G., United States v. Morris, 647 F.2d 568, 571-72 (5th Cir. 1981); United States v. Fallen, 498 F.2d 172, 177 (8th Cir. 1974); United States v. Stubin, 446 F.2d 457, 465 (3rd Cir. 1971). Judges are cautioned that the committee's instruction may not be acceptable in some circuits. Nevertheless, the committee has rejected the standard formulation because the analogy it uses seems misplaced. In the decisions people make in the most important of their own affairs, resolution of conflicts

> about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives - choosing a spouse, a job, a place to live, and the like - generally involve a very heavey element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases.

In fact the Committee did not consider whether the instruction impermissably shifts the burden of proof.

The total instruction on reasonable doubt conveyed a clear message. It told the jury that the jury could ask itself two questions. The first: Based upon the evidence are you firmly convinced that the defendant is guilty?. The second; Do you think there is a real possibility that he is not guilty?

The court conveyed the impression that if the jury did not <u>think</u> there was a real possibility that the

defendant was not guilty they should convict. By using the phrase "on the other hand" the court emphasized the fact that it might be an either/or situation. That is, they could convict either because they were firmly convinced based on the evidence that he was guilty or because they did not think there was a real possibility that he was not. Such an instruction is clearly erroneous. The jury must be left solely with the sense that it is the government's obligation to convince them of his guilt with utmost certainty. In re Winship, supra, 397 U.S. at 364, 90 S.Ct. at 1073. The question is not whether the jury thinks he is not guilty. He is presumed not guilty. He is entitled to have his guilt determined solely on the evidence, not on the grounds of

suspicion or conjecture. Taylor v. Kentucky, supra, 436 U.S. at 484, 98 S.Ct. at 1934. While the charge did mention the presumption of innocence it was greatly undermined by this instruction on reasonable doubt.

The trial court in effect told the jury that in order to acquit the doubt must be "a real possibility that the defendant is not guilty."

This shifting of the burden to the defendant was further emphasized to the jury by the court's including in its instruction just a few short paragraphs before the objected to language the statement:

> The burden of proving the defendant guilty beyond a reasonable doubt rests upon the government. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence of for that matter to produce any evidence. The defendant may rely on evidence brought out on cross examination

> of witnesses for the government, and in this case he relies both on that and also on the evidence that he presented during the course of his defense.

By including these comments just before its instructions on reasonable doubt the court conveyed to the jury the impression that the defendant relied on his evidence and cross-examination to create the "real possibility" of innocence referred to shortly thereafter. The impression was created that the defendant had some burden to create a reasonable doubt, or as the court phrased it here "a real possibility that he is not guilty." The overall effect of this instruction on presumption of innocence and reasonable doubt conveyed to the jury the sense that the defendant had some obligation to

establish doubt.3/

Viewing the judge's instruction on reasonable doubt in the context of the overall charges (see, Cupp v. Naughton, 414 U.S. 141, 146-147, 94 S.Ct. 396, 400 (1973)) it is clear that the offending paragraphs came at the outset of the charge and formed an integral part of the instructions on burden of proof. The district court itself indicated it had inserted new language which might be questionable.

3/ No specific objection was made to the court's comments as to the function of the defendant's evidence. It is the defendant's position that the incorrect jury instruction on reasonable doubt is sufficient in itself to warrant reversal. The court's comments on the defendant's evidence in the context of this charge exacerbated the effect of the incorrect instruction. It is submitted that these comments were covered by the objection to the reasonable doubt charge. To the extent they were not the defendant submits they were "plain error."

The error was of such a nature that in the present case it could not be erased or diminished by the balance of the charge. There is no way to determine which question the jury posed to itself during its deliberations and decision. The error was not harmless beyond a reasonable doubt for in this case the erroneous instruction might have made the difference between acquittal and conviction.

Accordingly, the Court of Appeals erred in upholding Petitioner's conviction.

II. THE TRIAL COURT'S INSTRUCTIONS ALLOWED THE JURY TO FIND PETITIONER GUILTY ON THE BASIS OF THREATENED PICKETING, THIS IMPERMISSIBLY AMENDING THE INDICTMENT

In the indictment in this case, the "wrongful use of fear of economic harm to A.I.S. and physical harm to the person of said officer and his family" was particularized: "in that the defendant threatened that violence would be done to the business of A.I.S. and that physical harm and violence would be done to said officer and his family unless such payment was made."

The means by which the extortion was allegedly committed were clearly limited to threats of violence to the business or threats of physical harm to Guilderson and his family. The indictment did not include a threat of lawful picketing or other lawful labor

activity.

The trial court gave misleading instructions which allowed the jury to find the defendant guilty if they believed that he had threatened picketing or other legitimate labor action. This was an impermissable amendment of the indictment, and requires reversal. United States v. Cusmano 659 F.2d.714 (6th Cir. 1981).

The relevant section of the court's charge to the jury follows:

> The term "wrongful" is used in the statute and is required to be proved to limit the coverage of the Hobbs Act. Obtaining property by force or fear is wrongful only in those instances where the alleged extortionist has no lawful claim to the property sought. The jury would reasonably conclude from this instruction that if Petitioner had no claim to any moneys of A.I.S. or Guilderson, his obtaining property by force or fear would be wrongful and in violation of the Hobbs Act no matter whether the harm threatened was violence or economic harm. The charge continues:

> The Hobbs Act then does not, for example, condemn the use of coercive measures to obtain wage increases or to carry out a collective bargaining agreement, if there is an agreement between a union and an employer. On the other hand, the Hobbs Act does forbid the use of coercive means to exact personal payoffs, and this aspect of the case is clear: that if the government proved that the defendant was exploiting fear or anxiety on the part of Guilderson about getting into trouble with the union down in Rhode Island and was taking money to pocket it periodically, well, then, if you reach that conclusion and if the other elements of the offense as I have been and will be further describing to you have been proved beyond a reasonable doubt, then you would be warranted to finding the defendant guilty.

Thus "coercive means" to exact personal payoffs are prohibited, with no limitation of the natuare of such "coercive means." As long as Petitioner was exploiting fear about "getting into trouble with the union down in Rhode Island" for his personal profit, the jury could find Petitioner

guilty.

The trial court strengthened the jury's impression that a threat of peaceful picketing would support a finding of guilty as it continued:

> It has not been suggested by anyone here in the case that a union official may exact payments to himself personally to guarantee labor peace. Unions have all sorts of legitimate rights under the law and, indeed, under the Constitution, but persons connected with the union may not bargain away those rights for personal gain. A union leader may not say: We won't picket if you pay me personally a sum of money.

While the Court of Appeals stated in its discussion of this question, "As already pointed out, defendant never used the word "picketing" and his choice of words could reasonably be inferred to connote physical violence," this overlooks the fact that Petitioner had testified at trial by "problems" with the union local in Rhode Island he had meant peaceful

picketing or other legitimate activities. While it is true that a union leader cannot extort personal payments by threats of picketing, a threat of picketing or other lawful activity was not charged in the indictment in this case. But the jury was never instructed that a threat of peaceful picketing or other lawful activity could not support a conviction. Indeed, the instruction, as it continues, leads to quite the opposite conclusion:

> There may be a perfect right under the law for the union to picket, but that is the right that is preserved by the law, and there is no right, and, indeed, the Hobbs Act forbids, if other esential elements are proved, officials taking money for their own purposes, that is, lining their own pockets in order to preserve labor peace or to prevent lawful activity by the union, and that is part of the government's allegation, that is, that the defendant knew of the vulnerability to union activity of

> the Guilderson company down in Rhode Island and he exploited it, it is the government's allegation, by telling Guilderson that he could take care of it if he paid him some money.

The grand jury that returned the indictment was willing to charge that Paul Gibson threatened violence to the business of A.I.S. and physical harm and violence in the family of Guilderson. But the court had no way of knowing that the grand jury considered a threat of picketing or other legitimate labor activity; the blunt fact is that the grand jury did not so charge. By allowing the jury to consider a means of extortion not charged in the indictment, the court, in effect, amended the indictment.

"An amendment of the indictment occurs where the charging terms of the indictment are altered, either literally or in effect, by prosecutor

or court after the grand jury has passed upon them" Gaither v. United States 413 F.2d 1061, 1071 (D.C. Cir. 1969)."[T]he settled rule in the federal courts [is] that an indictment may not be amended except by resubmission to a grand jury, unless the change is simply a matter of form. Ex. Parte Bain, 121 U.S. 1. [7 S.Ct. 718]; United States v. Norris, 281 U.S. 619 [50 S. Ct. 424]; Stirone v. United States, 361 U.S. 212 [80 S.Ct. 270]." Russell v. United States 369 U.S. 749, 770, 82 S. Ct. 1038, 1050 (1962). United States v. Winter, 663 F.2d 1120, 1139 (1st Cir. 1981). "A court cannot permit a defendant to be tried on charges that are not made in the indictment against him." Stirone v. United States, supra, 361 U.S. at 217, 80 S.Ct. at 273.

In Stirone, the indictment charged that the defendant interfered with interstate importation of sand, but the trial court charged the jury that a verdict of guilty could rest on interference with interstate shipments of steel. This Court reversed, stating:

> The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete. And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging interference with steel exports here is neither trivial, useless, nor innocuous. Compare Ford v. United States, 273 U.S. 593, 602, 47 S. Ct. 531, 534,

> 71 L. Ed. 793; Goto v. Lane, 265 U.S. 393, 402, 44 S. Ct. 525, 527, 68 L. Ed. 1070. While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.

Id. at 217, 80 S.Ct. at 273

In the present case, the jury might have based its conviction on a threat of picketing, a means not charged by the grand jury. The government cannot argue that the erroneous charge is harmless error.

The Sixth Circuit has decided a case on all fours with this appeal. In United States v. Cusmano, 659 F.2d 714 (6th Cir. 1981), the indictment charged a violation of the Hobbs Act. "The wrongful use of a force and fear"

was particularized, "in that the defendant's did threaten certain drivers . . . with unprofitable truck loads, the loss of their jobs and the loss of equity in their equipment." Id., at 715. The indictment thus alleged only one means of extortion: threats of economic loss. Id., at 715. The trial court instructed the jury that they might consider threats of a physical violence, and the jury returned a verdict of guilty. The Court of Appeals reversed, holding that ". . . when one means of extortion is charged, a conviction must rest on that charge and not another, even if it is assumed that under an indictment drawn in general terms a conviction might rest upon a showing of either form of extortion." Id., at 719.

As a matter of law a defendant is prejudiced by a constructive amendment. Watson v. Jago, 558 F.2d. 330 (6th Cir. 1976). An improper amendment which allows conviction on a ground not alleged by the indictment is fatal error and is per se reversable. Stirone, supra at 219, 80 S.Ct. at 274; United States v. Stewart Clinical Laboratory, Inc., 652 F. 2d 804 (9th Cir. 1981). The Court of Appeals erred in not reversing the conviction on the basis of the constructive amendment by the trial court of the indictment.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALBERT F. CULLEN, JR.
CULLEN & WALL
141 Tremont Street,
Boston, MA 02111
(617) 482-8650
Attorney for Petitioner
Paul W. Gibson

APPENDIX A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 83-1154

UNITED STATES OF AMERICA,

Appellee,

v.

PAUL W. GIBSON

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. W. Arthur Garrity, Jr.
U.S. District Judge]

Before

Campbell, Chief Judge,

Rosenn,* Senior Circuit Judge,

and Bownes, Circuit Judge.

---

* Of the Third Circuit, sitting by designation.

Albert F. Cullen, Jr., with whom Robert V. Carr, and Cullen & Wall were on brief, for appellant.

William C. Bryson, Attorney, Department of Justice, with whom William F. Weld, United States Attorney, and Diane M. Kottmyer, Special Attorney, Department of Justice, were on brief, for appellee.

January 30, 1984

BOWNES, Circuit Judge.

Defendant-appellant, Paul W. Gibson, appeals a jury conviction for attempting to obstruct commerce by means of extortion under 18 U.S.C. § 1951(a) (Hobbs Act).[1] Gibson asserts reversible error, raising five issues on appeal: (1) the trial court committed error in denying a motion for judgment of acquittal; (2) there was a constructive amendment to

---

1. 18 U.S.C. § 1951(a) provides:
Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

the indictment; (3) the trial court's jury instruction on reasonable doubt; (4) the trial court erred in not giving instructions on the defendant's theory of defense; and (5) defendant was erroneously denied exculpatory evidence relevant to sentencing and punishment.

We affirm.

We review the evidence in the light most favorable to the government. United States v. Morris, 700 F.2d 427, 432 (1st Cir.), cert. denied, 103 S.Ct. 2128 (1983); United States v. Winter, 663 F.2d 1120, 1127 (1st Cir. 1981), cert. denied, 103 S.Ct. 1249 (1982).

During the relevant period, defendant was the business manager of Roofers Local Union 33. The person extorted was Thomas A. Guilderson,

co-owner of Advanced Industrial Systems, Inc. (AIS), a Massachusetts roofing company.

In September of 1982 AIS was working on a $129,800 roofing job in Rhode Island; its employees were nonunion. On September 30 Guilderson received a message from his answering service to call defendant at the office of the Roofers Union. Guilderson called defendant, who questioned him as to the size of the Rhode Island job and then told Guilderson that he had "a problem." Defendant said that the business agent for the Providence Roofers Union, Arthur Cramer, was upset because AIS was nonunion. Defendant then offered "to take care" of the "problem" for a "consideration." Guilderson said that he was not aware of any problem, that

he would think about it and get back to defendant. Defendant insisted that Guilderson call him the next morning with an answer.

Guilderson promptly called his attorney. He then went to the job site and, after consulting with his partner, removed all of the company's valuable tools from the site so as to safeguard them against vandalism. The next morning Guilderson had his wife call the defendant and tell him that he could not call him back until the following Monday, October 4.

On Monday Guilderson met with two FBI agents and agreed to have his conversation with Gibson recorded. The pertinent parts of the conversation are as follows:

> Gibson (referring to Cramer): That's right and he wanted (laugh) just to walk in and try to harass ya and stop ya and do whatever the

hell he could for the job. Okay.

Gibson: And I said that I could take care of him, perhaps.

Guilderson: So if I say no I say I don't want to do anything about it.

Gibson: (unintell) that he has to do what he has to do.

Guilderson: Then then then Cramer gonna go ahead and do what he thinks he has to do so ah

Gibson: Right ya

Guilderson: To give us a problem

Gibson: Right

Guilderson: But ah but if I deal with you, you can get him off my back, is that it?

Gibson: Well, you won't deal with me, what you do is deal with him.

Guilderson: Oh, I'll deal with him.

Gibson: Right

Guilderson: Alright so we are, alright so okay

Gibson: (unintel) he doesn't know you and I happen to know you but ya you will deal through me for him ya, probably, I don't know how he would want to handle that.

Further into the conversation, a meeting was arranged for the next day at Linda Mae's Restaurant in Dorchester. When Guilderson asked how much money he should bring, defendant said that Guilderson should make an offer and he would decide if it was enough. Guilderson offered $500. Defendant then put Guilderson on hold and falsely claiming to have Cramer on another line, said, "I got him on the other line, can you make it seven and a half?" The amount of $750 was agreed upon. The following exchange then took place:

> Guilderson: Well, let me ask you this, is that gonna take care of my problem?
>
> Gibson: That's gonna eliminate it.
>
> Guilderson: It's gonna eliminate my problem.
>
> Gibson: Uh, huh
>
> Guilderson: Alright

Gibson: Do you know what you are doing here?

Guilderson: Do I know what I'm doing?

Gibson: Ya

Guilderson: I don't seem to have much choice here do I?

Gibson: Ya

During the call defendant said that Guilderson could fight but "I don't know how much [disputed word] he can give you." Guilderson testified that the word not faithfully reproduced was "violence." Defendant claims it was "problems." Near the end of the conversation defendant assured Guilderson that he "can guarantee ya the job is free and clear of any problems."

Guilderson wore a concealed recorder for the payoff meeting which took place in defendant's car near the restaurant. There was the following

exchange:

Guilderson: Let me ask you a question, all right let me ask you a question all right? You're a good guy and all like that right? You're doin me a favor on this alright?

Gibson: I hope I am.

Guilderson: Well, what I'm saying is

Gibson: That I am as far as that job is

Guilderson: What I'm saying is ahm I don't want to find out that ah you know this guy didn't get taken care of or whatever. How will I know you know that he isn't

Gibson: The guy ain't gonna come and kiss you and say Tommy

Guilderson: That's not what I'm talking about you know what I mean.

Gibson: The guy's taken care of. The guy is taken care of.

Guilderson: Okay.

Toward the end of the encounter Guilderson transferred the $750 to Gibson, and the following transpired:

Guilderson: Somebody ... whoever, that's your business. Okay you want the money?

You want to count it. (paper rustling)

Gibson: Nope, I can't fucken trust you I would say "where does Tom live?"

Guilderson: Uhm, uhm you mean if the money wasn't there what? You'd say where do I live?

Gibson: Yeah, I'd say "where does Tom live?" or "let me call him up and find out where the hell he lives" and what have you.

Guilderson: Uh, uh

When Guilderson again expressed concern about the Rhode Island job, the defendant said: "Let me tell you something there's nothin going to happen to that, okay? When I said to you this morning I guarantee this job, I can't guarantee you know six months down the road or three months down the road there."

After Guilderson left the car, defendant was arrested.

The Motion for Judgment of Acquittal

Our review of the district court's decision to deny a motion for acquittal is quite limited; we must affirm unless the evidence, viewed in the light most favorable to the government, could not have persuaded any rational trier of fact of the defendant's guilt beyond a reasonable doubt. United States v. Cincotta, 689 F.2d 238, 241 (1st Cir.), cert. denied, 103 S.Ct. 347 (1982). See also United States v. Weisz, 718 F.2d 413, 438 (D.C. Cir. 1983).

Defendant argues that his use of the word "problem(s)" in his conversations with Guilderson meant picketing or other legal union activities. It is well-known that picketing may engender violence to persons and to property. It is for

this reason that the Hobbs Act excludes from its reach "the use of force to achieve legitimate labor ends." United States v. Enmons, 410 U.S. 396, 401 (1973); United States v. Jacobs, 543 F.2d 18, 21 (7th Cir. 1976), cert. denied, 431 U.S. 929 (1977); United States v. Quinn, 514 F.2d 1250, 1257 (5th Cir. 1975), Cert. denied, 424 U.S. 955 (1976).

If the reference to "problem" in the first conversation had not been coupled with a pointed suggestion that the "problem" could be solved for a consideration, there might be some force to defendant's contention. Any payment received by Gibson for taking care of the "problem" could not have been demanded in pursuit of a legitimate labor objective. See United States v. Quinn, 514 F.2d at 1258-9.

Guilderson understood Gibson's offer to solve his company's "problem" for a consideration as a threat of violence to himself and to company property. He promptly moved to meet his perceived threat of vandalism by removing or securing all of the valuable tools at the job site. We think that the jury could properly infer that Gibson's use of the word "problem" plus his demand for a payoff to solve the problem was deliberately calculated to raise the spectre of violence.

The subsequent recorded conversations also suggested that unless a payoff was made violence was a definite possibility. Defendant's language certainly does not convey the message that the "problem" to be solved was picketing. Defendant never

used the word "picketing." The word "problem(s)," albeit vague, has an ominous connotation. The connotation of violence was heightened, not dispelled, by the subsequent conversations.

The district court's denial of the defendant's motion for acquittal was soundly based.

Constructive Amendment to the Indictment

The question is whether the trial court's instructions to the jury so differed from the indictment as to constructively amend it. To prevail on a constructive amendment to the indictment theory, appellant must show: (1) that he was tried on a charge different from the one in the indictment; or (2) that he was not

informed of the nature and cause of the accusation. United States v. Kelly, No. 83-1082, slip op. at 6-7 (1st Cir. Nov. 30, 1983).

Defendant's argument starts with the indictment:

> 2. From on or about September 30, 1982 to on or about October 4, 1982, the defendant, Paul W. Gibson, did knowingly, willfully and unlawfully attempt to obstruct, delay and affect commerce by means of extortion in that the defendant, Paul W. Gibson, did attempt to obtain money of A.I.S. from an officer of A.I.S., with said officer's consent, induced by the wrongful use of fear of economic harm to A.I.S. and physical harm to the person of said officer and his family in that the defendant threatened that violence would be done to the business of A.I.S. and that physical harm and violence would be done to said officer and his family unless such payment was made.

Defendant asserts that the charge to the jury was in conflict with the indictment and "created the impression that picketing along with personal

payoff may be sufficient to convict." The jury instruction was framed in terms of 18 U.S.C. § 1951(b)(2), a definitional section of the Hobbs Act which reads in relevant part, "[t]he term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear ...." The trial court correctly explained the extortive act: exacting a personal payoff from another to eliminate any union activity on the Rhode Island job site; and the means by which the act was accomplished: threatened violence against the business and the person of others.[2]

---

2. The instruction was as follows:

[Footnote continued]

It has not been suggested by anyone here in the case that a union official may exact payments to himself personally to guarantee labor peace. Unions have all sorts of legitimate rights under the law, and indeed, under the Constitution, but persons connected with the union may not bargain away those rights for personal gain. A union leader may not say: We won't picket if you pay me personally a sum of money. There may be a perfect right under the law for the union to picket, but that is the right that is preserved by the law, and there is no right, and, indeed, the Hobbs Act forbids, if other essential elements are proved, officials taking money for their own purposes, that is, lining their own pockets in order to preserve labor peace or to prevent lawful activity by the union, and that is part of the government's allegation that is, that the defendant knew of the vulnerability to union activity of the Guilderson company down in Rhode Island and he exploited it, it is the government's allegation, by telling Guilderson that he could take care of it if he paid him some money.

Well, if the intent on behalf of the defendant was to do that, was to get a personal payoff by means of exploiting Guilderson's fear of violence to the job in

[Footnote continued]

> Rhode Island or personal harm to his family, and if you have the impact on interstate commerce and the other essential elements that I have and will be describing, then if the government proves that beyond a reasonable doubt it has proved its case.

The court did not, as defendant contends, give misleading instructions allowing the jury to find defendant guilty if they believed that he had threatened picketing or other legitimate labor action. As already pointed out, defendant never used the word "picketing" and his choice of words could reasonably be inferred to connote physical violence. Defendant was not tried on a charge different from the one in the indictment and he was fully informed of the nature of the accusation.

The Instruction on Reasonable Doubt

The challenged instruction was as follows:

> If the government fails to prove the defendant guilty beyond a reasonable doubt, the jury must acquit him. Proof beyond a reasonable doubt is a phrase used in everyday conversation and it does not need extensive or elaborate definition. It is a reasonable doubt based upon reason and common sense and arising from the state of the evidence.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt.
>
> There are very few things in this world that we know with absolute certainty and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty. If two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, the jury should adopt

the one of innocence. (Emphasis added.)

This instruction is part of a pattern jury instruction on reasonable doubt formulated by the Federal Judicial Center.

Pattern Criminal Jury Instruction §21, Federal Judicial Center (1982).

Defendant argues that the phrase "on the other hand" improperly led the jury to believe "that [it] could convict either because [it was] firmly convinced, based on the evidence, that he was guilty, or because [it] did not think there was a real possibility that he was not." Thus, it is contended, the instruction invited the jury to shift the burden of proof from the government to the defendant to show that there was a real possibility that he was not guilty.

Appellant's argument proves once again that any attempt to define "reasonable doubt" will probably trigger a constitutional challenge. See United States v. Drake, 673 F.2d 15, 20-21 (1st Cir. 1982), for a compendium of cases in this circuit involving attacks on definitions of reasonable doubt. It can be said beyond any doubt that the words "reasonable doubt" do not lend themselves to accurate definition.

Altough we think that the sentence beginnng with "If, on the other hand" might possibly engender some confusion as to the burden of proof if it stood by itself, it is clear that when the charge is read as a whole, there was no error. "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the

context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-47 (1973). The district court also instructed the jury: "The burden of proving the defendant guilty beyond a reasonable doubt rests upon the government. This burden never shifts thorughout trial. The law does not require a defendant to prove his innocence or for that matter to produce any evidence." This was sufficient to dispel any possible confusion or misunderstanding arising from the reasonable doubt definition.

Failure to Instruct on Defendant's Theory of Defense

Defendant alleges that the trial court incorrectly refused to give his requested instruction setting forth his theory of defense. We recognize that, generally, "a party is entitled

to a specific instruction on his theory of the case." 2 C. Wright & A. Miller, Federal Practice and Procedure § 428 at 689 (1982); see United States v. Brake, 596 F.2d 337, 339 (8th Cir. 1979). The refusal to give a particular requested instruction, however, is reversible error only if "the instruction (1) is substantively correct; (2) was not substantially covered in the charge actually delivered to the jury; and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense." United States v. Grissom, 645 F.2d 461, 464 (5th Cir. 1981). The trial court's charge to the jury need not follow the exact form and wording of the defendant's proposed

instructions. United States v. Morris, 700 F.2d 427, 433 (1st Cir.), cert. denied, 103 S.C. 2128 (1983); United States v. Gaines, 690 F.2d 849, 855 (11th Cir. 1982); United States v. Skinner, 667 F.2d 1306, 1310 (9th Cir. 1982); United States v. Brake, 576 F.2d at 339; United States v. Westbo, 576 F.2d 285, 289 (10th cir. 1978).

We have carefully read the charge and conclude that each of the seven points of appellant's theory of defense[3] was clearly and adequately

---

3. Appellant's seven-point theory of defense is set forth in condensed form below:

[1] A threat to do what party making threat has a legal right to do does not constitute duress or coercion.

[2] Picketing peacefully and truthfully is lawful means of advertising organized labor's grievances to the public and right guaranteed by Constitution as

[Footnote continued]

incident of free speech.
[3] Threats to do only what party making them has a lawful right to do are not unlawful.
[4] Labor union members may bring such lawful pressure to bear as is within their control to induce non-union employees to join them.
[5] There is an exception to the statute. You may not convict a labor union official of a violation of this statute if he is pursuing legitimate objectives of organized labor.
[6] Paul W. Gibson contends he accepted the money on behalf of the union and that his goals of either obtaining work for the members of his union or of obtaining compensation to his union for the agreement not to exercise its legitimate rights are legitimate goals of organized labor.
[7] The government must prove beyond a reasonable doubt that the defendant Paul Gibson was using coercive means (duress) to exact a personal payoff. If you find that the payment or delivery of money was made in compromise, settlement and release of a claim, grievance or dispute in the absence of duress, you must find that defendant not guilty.

covered. First, in regard to defendant's first and third theories

of defense, the trial court charged, inter alia, "The Hobbs Act then does not, for example, condemn the use of coercive measures to obtain wage increases or to carry out a collective bargaining agreement, if there is an agreement between union and an employer." The second theory of defense was also covered by the district court: "Unions have all sorts of legitimate rights under the law and, indeed, under the Constitution .... [T]here may be a perfect right under the law for the union to picket, but that is the right that is preserved by the law...." Later in the instructions, the trial court correctly defined theories four through seven in its description of what constitutes legitimate labor activities, the elements of an 18

U.S.C. § 1951 violation, and the government's burden of proof.

The jury instructions were clear, comprehensive, complete, and accurate. Defendant's contention that the charge negated his "ability to present a given defense" is without merit.

Exculpatory Evidence

A week before the sentencing date defense counsel moved that the government produce "any and all information in its possession which is favorable to the defendant on the sentencing issue." The statements of seven named individuals who either testified before the grand jury or were interviewed by the FBI agents were requested. The motion stated that it was Gibson's understanding

that these named individuals "spoke well of the defendant and knew of no criminal conduct." The motion further alleged that this information and similar statements the government might have "would assist the defendant and his counsel in preparing and presenting to the court an appropriate report regarding his character and the circumstances surrounding his behavior which would be helpful in imposing sentence."

We agree with the district court that this attempt to dredge something favorable out of the government files does not come within the letter, intent, or spirit of Brady v. Maryland, 373 U.S. 83 (1963). We think the court's sentencing procedure was eminently fair. It refused to consider evidence offered by the

government of prior similar misconduct by defendant. It carefully read and took into consideration a large number of letters attesting to defendant's good character. The court rejected the government's recommendation of a three-year sentence and imposed a one year sentence. Its reasons for the sentence were stated fully in the record.

There was no error in the sentencing process.

Affirmed

APPENDIX B

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 83-1154

UNITED STATES OF AMERICA,
Appellee,

v.

PAUL W. GIBSON,
Defendant, Appellant.

JUDGMENT

Entered January 30, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

[Signed by Francis P. Scigliano]
Clerk